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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ELASTICSEARCH, INC., a Delaware corporation, ELASTICSEARCH B.V., a Dutch corporation, Plaintiffs, v. FLORAGUNN GmbH, a German corporation, Defendant.	Case No. 4:19-cv-05553-YGR **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO EXCLUDE PORTIONS OF TESTIMONY OF PLAINTIFFS' EXPERT MATTHEW LYNDE** Date: October 5, 2021 Time: 2:00 p.m. Dept: Courtroom 1, 4th Fl. Judge: Hon. Yvonne Gonzalez Rogers

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INTRODUCTION

2   This motion does not just challenge the adequacy of the data underlying Dr. Lynde's

3   analysis. Rather, floragunn seeks to exclude Dr. Lynde's opinions that Elastic █████████

4   ███████ in sales to AESS and IBM Databases because he applied *no methodology at all* in

5   determining that the alleged infringement caused the purported losses.

6   Dr. Lynde made the unusual choice to measure *Elastic's own a*ctual damages through the

7   sale of allegedly *competing products*, rather than through Elastic's own sales data and records.

8   Having made that choice, Dr. Lynde must set forth a reliable methodology for establishing

9   whether and to what extent AESS and IBM Database sales caused Elastic to lose sales. But

10 instead of doing so, Dr. Lynde simply counts as lost profits (1) *all* sales of AESS for which

11 allegedly infringing features were enabled (at no cost) and (2) *all* sales of IBM Databases. The

12 only basis for this opinion is that Elastic's management claims that a binary market exists

13 between floragunn's alleged infringing product and Elastic's X-Pack product. Based on that

14 representation, Dr. Lynde counts every AESS and IBM Databases sale that contains alleged

15 infringing code as lost business of Elastic, notwithstanding the many other reasons a customer

16 might have chosen AESS or IBM Databases (or a host of other search providers) over Elastic,

17 and notwithstanding Dr. Lynde's opinion that only a small fraction of Search Guard customers

18 would have bought an Elastic license but for the infringement.

19 Nothing in Elastic's opposition establishes the admissibility of Dr. Lynde's approach to

20 calculating alleged lost profits. Accordingly, floragunn respectfully requests that the Court

21 exclude Dr. Lynde's opinions regarding lost profits allegedly attributable to AESS and IBM

22 Databases.

23

ARGUMENT

24 **A.   Dr. Lynde has not reliably concluded that a "binary" market exists.**

25 The underpinning of Dr. Lynde's lost profits analysis is the alleged existence of a

26 "binary" market. However, nothing in Elastic's opposition renders reliable Dr. Lynde's opinion

27 regarding the existence of such a market. In defending Dr. Lynde's opinion, Elastic begins with

28 the uncontroversial and unchallenged observation that an expert may rely on information

provided by party witnesses. *See* ECF No. 178-3, Elastic's Memorandum in Opposition ("Opp.") at 16-17. floragunn does not argue otherwise. Nor does floragunn dispute that Elastic executives may have knowledge regarding the market in which they operate. Rather, the issue raised in floragunn's motion to exclude is whether an expert may reliably conclude that the market for AESS, IBM Databases, Search Guard and Elastic's X-pack products is defined by demand for the features enabled by the AIC, such that the only market participants are Elastic and the three products that allegedly employ the AIC. *See* ECF No. 153, Defendants' Motion to Exclude ("Mot.") at 11-12. The perspectives of Elastic's executives can be considered, but they cannot render this market conclusion reliable in the face of extensive contradictory evidence and obvious alternative explanations. *See In re Mirena Ius Levonorgestrel-Related Prods. Liab. Litig. (No. II)*, 341 F. Supp. 3d 213, 277 (S.D.N.Y. 2018), *aff'd sub nom. In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II)*, 982 F.3d 113 (2d Cir. 2020) (expert must consider "alternative, and benign, explanations" and collecting cases holding same). Dr. Lynde fails to consider or dismisses out of hand such contradictory evidence or obvious alternative explanations, rending his opinion unreliable.

Nor can the limited documents cited by Dr. Lynde support a conclusion that such a binary market exists. *See* Opp. at 18. First, Elastic points to AESS usage information, but that information relates to enablement of the accused features, *not the reasons* AESS customers chose the product. *See* ECF No. 179, Declaration of David Eberhart ("Eberhart Decl."), Ex. 6 (Declaration of Carl Meadows).

Second, Elastic claims that Dr. Lynde reviewed Elastic sales information that purportedly shows lost sales to AESS and IBM (Opp. at 18), but nowhere in his reports does Dr. Lynde reference Elastic's sales and financial data in connection with his actual damages opinion for sales allegedly lost to AESS or IBM, and there is no evidence that such data would support Dr. Lynde's conclusions in any event. In fact, Dr. Lynde reviewed Elastic's CRM data extensively in relation to his assessment of Elastic's alleged lost sales to Search Guard, and reached the conclusion that ███████ of Search Guard customers would have otherwise purchased an Elastic license. *See* ECF No. 154, Declaration of David Rivkin in support of Mot. to Exclude

1   ("Rivkin Decl."), Ex. H, Lynde Report. Sched. 6N. Such an analysis is conspicuously absent in

2   connection with the AESS and IBM opinions.

3   Third, Elastic claims that Dr. Lynde relied on AESS marketing and pricing materials.

4   But, again, his report says nothing about how either source of information relates to his opinions

5   that there is a binary market or that each gain for AESS or IBM is a loss for Elastic, and thus

6   there is no reason to believe these materials support Dr. Lynde's conclusion in any way. Finally,

7   Elastic points to its 10-K, which acknowledges competition with Amazon. But that document

8   hardly supports Dr. Lynde's claim of a binary market, and it acknowledges competition with

9   over a dozen companies, including several specifically identified as competing on security. *See*

10 Eberhart Decl., Ex. 1 at 13. Moreover, even if these materials were relevant, and they are not,

11 they cannot overcome Dr. Lynde's acknowledgement in his report that his "binary" market

12 opinion is only based on his conversations with Elastic's executives. *See* Rivkin Decl., Ex. H,

13 Lynde Rpt. ¶¶ 48-49, n.121 (citing only conversations with Mr. Kearns and Mr. Hoffman).

14   Elastic has also not explained away the ample evidence of alternatives in the search

15 market or the other reasons that may have driven consumer decisions to become customers of

16 AESS or IBM Databases besides the AIC. *See* Opp. at 18-21. First, Elastic makes the

17 tautological argument that because the purchasers of X-Pack or the allegedly infringing products

18 chose those products, they "demonstrated" their desire for those products and thus must not have

19 wanted a different search product or different set of features. Opp. at 19. The argument amounts

20 to the assertion that "the consumer chose the product, and therefore the consumer would not have

21 chosen another product." Were this a reliable way to define a market, there would be very little

22 need for economic experts. Of course, this is not a reliable methodology because it does not

23 consider any other obvious reasons that a consumer may have purchased AESS or IBM

24 Databases besides the allegedly infringing features and whether any other product could have

25 met those needs. As noted in floragunn's motion, some of those reasons are: preexisting

26 customer relationships, the strengths of their business models, their market presence and

27 reputations, and the specifics of their software solutions. *See* Mot. at 15.

28

1   It is also no response that floragunn has not identified a different market, as causation is

2   Elastic's burden. In any event, floragunn and its expert, Brian Buss, have identified other more

3   plausible markets, including the market for search functionality, which would include, among

4   others, Elastic's competitors ███████. *See* Mot at 12-13; ECF No. 179-2, Report of

5   Brian Buss, ¶ 51.

6   Finally, that market definition may be a fact question in other areas of the law does not

7   relieve Dr. Lynde or Elastic of its burdens under Rule 702 and *Daubert*. *See* Opp. at 20.

8   floragunn does not dispute that there may be multiple reasonable definitions of a market in a

9   given dispute, which might require adjudication by a finder of fact. The issue here is that Dr.

10   Lynde's definition is not reasonable, and thus must be excluded pursuant to the Court's

11   gatekeeping function. Courts routinely exclude unreliable opinions regarding the definition of a

12   market. *See Plush Lounge Las Vegas LLC v. Hotspur Resorts Nev. Inc.*, 371 F. App'x 719, 720–

13   21 (9th Cir. 2010) (affirming district court's exclusion of experts' testimony regarding proposed

14   market definition where the testimony "fell short of the reliability and relevancy requirements for

15   the admissibility of expert testimony under Rule 702"); *see also Kentucky v. Marathon*

16   *Petroleum Co.*, 464 F. Supp. 3d 880, 889–90 (W.D. Ky. 2020) (observing that many courts have

17   found a lack of sufficiently reliable expert testimony supporting a proposed market to be grounds

18   to exclude the market definition).

19   Likewise, the patent cases that Elastic cites for the proposition that a two-player market

20   *may* be sufficient evidence of causation do not support the admissibility of Dr. Lynde's opinion.

21   *See* Opp. at 8-9. As explained, Dr. Lynde has not reliably concluded that all buyers of AESS

22   (with enabled N2N and FGAC features) and all buyers of IBM Databases made their purchases

23   because of the existence of the allegedly infringing features, such that their only alternative was

24   an Elastic Cloud license. In that respect, the cases Elastic cites offer a useful counterpoint. In

25   *State Industries*, the District Court found that "there was no acceptable non-infringing method of

26   satisfactorily foaming gas water heaters in the market place." *State Indus., Inc. v. Mor-Flo*

27   *Indus., Inc.*, 883 F.2d 1573, 1578–79 (Fed. Cir. 1989). In contrast, there are other alternatives in

28   the search field, as evidenced in part by Dr. Lynde's own opinion that Elastic would not have

captured all of Search Guard's sales if not for the alleged infringement. And in *Lam*, the court held that the existence of a two-supplier market was a reliable basis for "an award *based on projected lost sales*," not a basis to conclude that the IP holder would have made all infringing sales. *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1068 (Fed. Cir. 1983).

The cited District Court decisions are no more helpful to Elastic's argument. In *Volterra*, the court held that the existence of a two-supplier market might support a price erosion theory of damages – not an inference that the plaintiff would have made all infringing sales. *Volterra Semiconductor Corp. v. Primarion, Inc.*, No. 08-cv-05129-JCS, 2013 WL 6905555, at *19 (N.D. Cal. Nov. 18, 2013). In *Beckson,* it was apparently undisputed that the plaintiff and defendant were "the two sole market suppliers of the patented '350 portlights." *Beckson Marine, Inc. v. NFM, Inc.*, No. C98 5531 FDB, 2007 WL 951706, at *1 (W.D. Wash. Mar. 27, 2007). In *AFL*, the expert assumed the defendant would have made all of the plaintiff's sales, but "because Mr. Crowder has provided detailed calculations, the numbers can be adjusted according to the findings of the trier of fact with regard to lost sales." *AFL Telecomms. LLC v. SurplusEQ.com Inc.*, 946 F. Supp. 2d 928, 947 (D. Ariz. 2013). Likewise, the *Brighton* expert "[did] not seek to tell the jury what ratio to apply to the lost profits, but how to calculate damages reliably once they have determined the proper ratio based on evidence at trial; in fact, the expert suggests that 'should the judge and/or jury wish to consider lost profits resulting from a lost sales transaction ratio other than a one-to-one ratio, they could simply multiply my calculation of lost profits by an alternative lost sales transaction ratio.'" *Brighton Collectibles, Inc. v. Coldwater Creek Inc.*, No. 08-CV-2307-H(POR), 2010 WL 3718859, at *10 (S.D. Cal. Sept. 20, 2010). Unlike the *AFL* and *Brighton* experts, Dr. Lynde *does* intend to tell the jury that the proper ratio is 1:1, and offers no path to adjustment or alternative ratios. Finally, the expert in *Habersham* explicitly disavowed any opinion on causation, with the plaintiff saying he was not a "causation expert." *Habersham Plantation Corp. v. Molyneux*, No. 10-61526-CIV-DIMITROULEAS, 2011 WL 13214323, at *3 (S.D. Fla. Sept. 13, 2011).

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1   In sum, Elastic has not cited a single case in which an expert was permitted to opine that

2   the copyright holder would have made *all* sales of allegedly infringing products but for the

3   alleged infringement based solely on the existence of purported binary market.

4   **B.   Dr. Lynde has not reliably concluded that all the counted lost customers**
     would have otherwise purchased an Elastic license.

5

6   Elastic goes on at length about the "robust and careful analysis" Dr. Lynde employed to

7   identify the AESS domains who activated the allegedly infringing features. Opp. at 4-5; 10-11.

8   But Elastic's argument is a misdirection as this portion of Dr. Lynde's analysis is wholly

9   irrelevant to the reliability question raised in floragunn's motion. floragunn does not challenge

10   the methodology Dr. Lynde used to estimate the number of users who enabled N2N or FGAC.

11   Rather, floragunn challenges his *next* step, in which Dr. Lynde concludes that *all* such users

12   would have purchased an Elastic license but for the alleged infringement. Tellingly, Elastic's

13   description of that step is much shorter:

14   Dr. Lynde then analyzed the market for managed Elasticsearch services that include
     security features, including an assessment of the pricing mechanics for the main services
15   and the features available on managed Elasticsearch services. Ex. L (Lynde Dep.) 54-55.
     He concluded that the only viable competitors are Elastic Cloud and the accused services.
16   Dr. Lynde then opined that the subset of AESS users that enabled accused features—
     corresponding ██████████████████████████ of N2N-enabled domains—
17   would have purchased Elastic Cloud licenses absent the infringement.

18

19   Opp. at 5-6. Thus, Dr. Lynde concludes that all AESS domains that enabled the N2N and FGAC

20   features would have otherwise become Elastic Cloud customers at ratio of 1:1, without

21   explaining how this conclusion was reached, *e.g.,* what information was consulted, what factors

22   were considered, or what other explanations were evaluated.

23   Later in the Opposition, Elastic summarizes all the evidence that was available to Dr.

24   Lynde to support his conclusion that every AESS customer who enabled N2N and FGAC would

25   have otherwise bought an Elastic license. None of it comes close to supporting Dr. Lynde's

26   conclusion. First, Elastic cites a declaration from Amazon executive Carl Meadows, claiming

27   the declaration "is superior to whatever evidence he could have derived from conversations with

28   a few of AESS's ██████████ of users." Opp. at 11. This is a telling admission because the

Meadows Declaration says *nothing at all* about whether the AESS customers who turned on features containing the AIC cared about these features or would have bought a license from Elastic had AESS not contained such features. Instead, Mr. Meadows' Declaration is limited to an overview of data regarding the total number of domains that enabled the allegedly infringing features. *See* Eberhart Decl. Ex.6. Elastic then cites an Amazon blog post announcing the availability of the allegedly infringing features (*id.*, Ex. 9), and the fact that Amazon paid floragunn ▮▮▮▮▮ for a license to the Search Guard code, purportedly as evidence of the value of these features.[1] Opp. at 12. Of course, it goes without saying that Amazon saw at least some value in offering the allegedly infringing features in its AESS product, but that fact does nothing to support any argument that these features drove significant demand among the consumers who enabled them (for free), much less that they were responsible for 100% of such demand, as Dr. Lynde concludes. Finally, Elastic cites the testimony of an Elastic executive that these features were "critical features for some customers." Opp. at 12. That an Elastic executive said the allegedly infringing features were important is not a reliable basis for concluding that Elastic would have captured *all* the allegedly infringing sales of AESS and IBM Databases had these competitors of Elastic not contained the alleged infringing code.

As to other obvious explanations for why the customers who happened to enable the free security features chose to purchase an AESS license, Elastic's dismissal is perfunctory: "Dr. Lynde acknowledged—and investigated—such alternative reasons for demand, and concluded that the evidence showed users' demonstrated interest in the infringing security features." Opp. at 12. But as noted above, Dr. Lynde cites no such evidence of demonstrated interest, and certainly not to the exclusion of all other drivers of demand.

Elastic's explanation of Dr. Lynde's IBM causation analysis is also cursory, stating only: "Because no other managed Elasticsearch service provided the mandatory security features that IBM incorporated, Dr. Lynde determined that Elastic Cloud is the only viable, non-infringing

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[1] The purchase price paid by Amazon was ▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮ *See* ECF No. 162-5, Declaration of David Eberhart in support of Mot. to Exclude Testimony of B. Buss, Ex. C.

alternative for users of these instances to obtain these critical security features." Opp. at 6-7.
Neither of the two sources of evidence that Elastic cites supports Dr. Lynde's opinion that *all*
IBM Databases customers would have purchased a license from Elastic but for the infringement.
First, Elastic points to an IBM document that describes *all eleven* plugins available with IBM
Databases, and which states that *all* the listed plugins are "already enabled," such that users
"cannot install, uninstall, enable, or disable" *any* of them. Eberhart Decl. Ex. 5 at Ex. 1.   Thus,
contrary to Elastic's suggestion, the Search Guard-related plugin is just one of eleven plugins
that IBM explicitly touted to its users and that IBM required all users to enable.   Neither Dr.
Lynde nor Elastic explains how this one plugin drove *all* demand for IBM Databases, while none
of the other touted and mandatory features had any impact whatsoever. The only other evidence
that Elastic cites is "information from Elastic executives with knowledge of the relevant
customer base that these features were 'critical features for some customers.'" Opp. at 13. That
information may be well be accurate for some customers, but it is certainly not a reliable basis to
conclude that all IBM Databases customers would have purchased an Elastic Cloud license but
for the infringement.

In sum, nothing in Elastic's opposition can explain away the fundamentally flawed,
circular nature of Dr. Lynde's so-called causation methodology that all AESS customers who
turned on N2N and FGAC are lost Elastic customers simply because they turned on these free
features, and that all IBM Databases customers are lost Elastic customers simply because they
have access to a product with the infringing code. No evidence of demand is cited, and no
attention is paid to obvious alternative explanations for customers' decisions to purchase IBM
Databases or exercise a free option to enable N2N and FGAC on AESS.

C.   Dr. Lynde's opinions are internally inconsistent.

Elastic has failed to explain the internal inconsistencies in Dr. Lynde's analysis, which
wholly undermine its reliability. As explained in floragunn's motion, Dr. Lynde opines that only
███ of Search Guard's customers would have otherwise chosen to become paid Elastic
customers of Elastic but for the infringement, while 100% of AESS customers who enabled N2N

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1 and FGAC features and 100% of IBM Databases customers would have otherwise chosen

2 Elastic. *See* Mot. at 17.

3   Elastic attempts to address this enormous discrepancy by pointing out that the usage data

4 Dr. Lynde utilized in estimating the number of AESS and IBM Databases customers does not

5 exist for Search Guard customers. Opp. at 14. Then Elastic asserts that an estimate of the

6 number of customers who enabled the allegedly infringing features constitutes *better information*

7 regarding customer preferences than actual communications and invoices from specific identified

8 customers. *See id.*   In other words, according to Elastic, a customer's decision to enable free

9 features is better evidence that this customer would have bought an Elastic license but for the

10 infringement than evidence of what a customer actually told Elastic or floragunn about its

11 purchasing decisions. This argument is simply not logical. It is also not what Dr. Lynde testified

12 to at his deposition, when he admitted ███████████████████████████

13 ██

14 ████. ECF No. 169-2, Lynde Dep. Tr. 141:5-143:9.

15   To be clear, floragunn has never argued that details of any particular lost sale are a

16 condition precedent to a lost profits analysis, and thus the cases that Elastic cites on this point are

17 inapposite. *See* Opp. at 15. But in the absence of any information whatsoever about the actual

18 AESS and IBM Databases customers, Dr. Lynde must offer a reliable methodology for

19 estimating the impact of the alleged AIC on Elastic's business. Simply assuming that all IBM

20 Databases customers and all AESS customers who activated free security features would have

21 otherwise gone to Elastic is not a reliable approach to causation.

22   Next, Elastic misleadingly suggests that Dr. Lynde's conclusion that ████ of Search

23 Guard customers are lost Elastic customers should be compared to his finding that ████ of

24 AESS domains enabled N2N, rather than his conclusion that 100% of the enabled domains

25 constitute lost customers. *Id.* This makes no sense. All AESS customers who enabled FGAC

26 and N2N had access to the features allegedly supported by the AIC. Likewise, all paid Search

27 Guard customers had access to the features allegedly supported by the AIC. Thus, the Search

28 Guard customers and the N2N and FGAC-enabled AESS customers (not the entire universe of

1   AESS customers) are equivalent in their access to the allegedly infringing features, and thus are

2   the proper subject of an apples-to-apples comparison. Yet in the case of Search Guard, Dr.

3   Lynde estimates that only ▇ of such customers would have bought a license from Elastic if

4   they could not have accessed the features from floragunn. In contrast, 100% of the enabled

5   AESS customers would have done so. Elastic still has not explained this glaring inconsistency,

6   and it renders Dr. Lynde's conclusions entirely unreliable.

7   As to IBM Databases, Elastic does not (and cannot) dispute that Dr. Lynde's conclusion

8   that 100% of IBM Databases customers were lost to Elastic is analogous to his finding that only

9   ▇ of Search Guard customers were lost. Elastic makes no effort to explain the divergence of

10 his opinions, instead merely noting that IBM included information about the allegedly infringing

11 functionality on its website. Opp. at 15 (citing Eberhart Decl. Ex. 5). This by no means

12 reconciles Dr. Lynde's massively conflicting conclusions; if, as Dr. Lynde assumes, the

13 infringing features were so important to IBM customers such that they all would have found

14 Elastic and bought a license, the same should be true for Search Guard's customers. Yet

15 according to Dr. Lynde's own analysis, the assumption fails.

16   Finally, Elastic appears to argue that the reason only ▇ of paid Search Guard

17 customers constituted lost Elastic customers was that floragunn's Search Guard product for self-

18 managed customers was priced lower than Elastic's X-Pack plugin for self-managed customers

19 (whereas the AESS, IBM Databases and Elastic Cloud managed services are all allegedly

20 comparably priced). Opp. at 15-16. As an initial matter, Dr. Lynde did not cite any specific

21 pricing information or comparison in his report to support this contention regarding a pricing

22 difference between X-Pack and floragunn's Search Guard plugin -- other than making an

23 unsubstantiated claim that Search Guard was priced lower than Elastic's X-Pack "in part because

24 Search Guard incorporates Elastic's Infringing Code." Rivkin Decl. Ex. J, Lynde Reply Rpt., ¶

25 24. Instead, Elastic cites to Schedule 6B of the Buss Report, which indicates that there is

26 evidence that certain customers chose not to use Elastic's X-Pack because of pricing. But X-Pack

27 contained more features than Search Guard did, and the "pricing" issue was often the fact that

28 customers did not need all the features of X-Pack that Elastic required them to purchase. Since

1   Dr. Lynde performs no analysis of Elastic's and floragunn's self-managed security plugin

2   pricing, and certainly not one that would qualify as an "apples-to-apples" comparison, there is no

3   basis for Dr. Lynde to state what, if any, impact price would have had on the demand for each

4   product. Therefore, alleged differences in pricing do not explain the inconsistencies between Dr.

5   Lynde's conclusions regarding sales allegedly lost to floragunn verses his conclusions regarding

6   AESS and IBM Databases.

7   **D.   Elastic fails to distinguish the authority cited in floragunn's motion.**

8   Finally, as detailed below, Elastic is wrong that the case law favors admission of Dr.

9   Lynde's testimony. *See* Opp. at 20-25.

10   In *Grouse River Outfitters,* the expert concluded, without any factual basis, that 100% of

11   the difference between the plaintiff's projected sales and its actual sales was attributable to the

12   defendant's alleged misconduct. *Grouse River Outfitters Ltd. v. Oracle Corp.*, No. 16-cv-02954-

13   LB, 2019 WL 8918902, at *9 (N.D. Cal. June 21, 2019). The court excluded the opinion as

14   unreliable because it was based on nothing more than correlation. *Id.* Dr. Lynde's analysis is no

15   better; he counts 100% of allegedly infringing sales by IBM Databases and AESS as lost sales by

16   Elastic without any reliable evidence that such customers would in fact have purchased an

17   Elastic license but for the alleged infringement. As explained, the say-so of management and

18   theoretical switching costs do not constitute reliable support for Dr. Lynde's 1:1 conclusion.

19   As Elastic notes, the expert opinions in *In re General Motors LLC Ignition Switch*

20   *Litigation*, were deemed unreliable because of the experts' failure to consider obvious alternative

21   explanations of causation for a car accident. *In re Gen. Motors LLC Ignition Switch Litig.*, No.

22   14-CV-5810, 2017 WL 6729295, at *10 (S.D.N.Y. Dec. 28, 2017). Elastic attempts to

23   distinguish this case by arguing that floragunn has not pointed to obvious alternative

24   explanations for consumers' purchase of AESS or IBM Databases other than the AIC. But the

25   Motion to Exclude is explicit about such alternatives, none of which Elastic chooses to address:

26   *See* Mot. at 12-13.

27   Further, the expert opinion in *Brighton Collectible* is not analogous. *See* Opp. at 20. In

28   that case, the court rejected a relevance objection (*i.e.,* not a reliability objection) on the basis

1   that the expert did not control for all variables that might have affected jewelry sales in his

2   analysis. *Brighton Collectible, LLC v. Believe Prod., Inc.*, No. 2:15-cv-00579-CAS (ASx), 2017

3   WL 440255, at *6 (C.D. Cal. Jan. 30, 2017). Notably, in contrast to Dr. Lynde, the *Brighton*

4   expert relied on the IP holder's sales and projections in calculating lost profits (not the sales of

5   allegedly infringing goods). The court noted that the expert "controlled for certain variables

6   which he viewed as important such as seasonal variation in sales and whether certain products

7   were new." *Id.* Here, in contrast, Dr. Lynde ran no such analysis of Elastic's sales and

8   projections, instead jumping to a 1:1 conclusion based on third party sales that ignores evidence

9   in the record and obvious alternative explanations for the purchase of allegedly infringing

10 products.

11   Contrary to Elastic's characterizations, the cases cited by floragunn provide ample

12 authority for excluding Dr. Lynde's opinions. To begin, while factually distinct, this Court's

13 decisions in *Otto* and *Young* are instructive. The *Otto* expert's opinions were excluded "where

14 he merely regurgitates information untethered to any methodology and is otherwise speculative."

15 *Otto v. LeMahieu*, No. 4:19-cv-00054-YGR, 2021 WL 1615311, at *5 (N.D. Cal. Apr. 26, 2021).

16 Similarly, Dr. Lynde's "methodology" is to rely on Elastic's executives' opinions on the alleged

17 "binary" market and then assign all sales of the allegedly infringing AESS and IBM goods as lost

18 sales. The expert in *Young* was excluded, in part, for his failure to offer a "causal link between

19 the purported defect and liability." *Young v. Cree Inc.*, No. 4:17-cv-06252-YGR, 2021 WL

20 292549, at *11 (N.D. Cal. Jan. 28, 2021). Dr. Lynde's causation opinion is similarly lacking,

21 where causation is based on nothing more than an untested binary market assumption.

22   floragunn's other cited authority all support the proposition that a causation expert must

23 rest his opinion on reliable information and assumptions. The expert in *McGlinchy* was excluded

24 because "he attributed all of the future lost profits to acts of Shell Oil Company," rather than

25 "specific acts." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 806 (9th Cir. 1988). Dr. Lynde's

26 opinion is similarly vague, as he attributes all allegedly infringing sales to the infringement,

27 without any specific indication of causation. In *Oculu*, the Court excluded an opinion that the

28 defendant "was the sole cause of the drop in web traffic (which then caused a drop in the number

1   of customers).” *Oculu, LLC v. Oculus VR, Inc.*, No. SACV 14-0196 DOC(JPRx), 2015 WL

2   3619204, at *21 (C.D. Cal. June 8, 2015). The Court faulted the expert for not “explain[ing]

3   which potential alternative reasons for the drop in website traffic he considered or how he ruled

4   them out,” meaning the causation opinion relied only on correlation. *Id.* Similarly, Dr. Lynde

5   has not explained his basis for ruling out all other reasons someone might have bought an

6   allegedly infringing product or why he assumes all such purchasers would have sought an Elastic

7   license. And while *Cohen* involved a damages claim for non-infringed works, the expert’s

8   analytical gaps were directly comparable to Dr. Lynde’s: the expert found causation without

9   “setting forth any evidence of causation, such as lost customers or cancelled orders,” instead

10 simply assuming the infringement caused losses. *Cohen v. United States*, 100 Fed. Cl. 461, 482

11 (2011).

12   Elastic also fails to distinguish *Brighton Collectibles*. *See* Opp. at 23-24. First, as noted

13 above, the say-so of Elastic executives and the cited documents are not a reliable basis to

14 conclude that X-Pack is the only other option for consumers of the allegedly infringing product,

15 or that all such customers would indeed have sought a license from Elastic but for the

16 infringement. Second, as also explained, the fact that the AESS users turned on a free feature

17 and that the IBM users selected a product with allegedly infringing features by no means

18 establishes a reliable “nexus” between the infringement and the purchases. That is correlation,

19 not causation. Third, that the expert counted each lost “transaction” as the loss of “2.06 bags”

20 does not alter the court’s conclusion that “Wunderlich improperly equates Defendants' infringing

21 sales with Brighton's own lost profits on a scale of 1:1.” *Brighton Collectibles, Inc. v. RK Texas

22 Leather Mfg.*, 923 F. Supp. 2d 1245, 1254 (S.D. Cal. 2013).

23   Next, Elastic attempts to compare Dr. Lynde’s inclusion of all AESS customers who

24 enabled N2N and FGAC for free to the *Stevens Linen* expert’s inclusion of all customers who

25 had made a purchase from both the plaintiff and then the defendant. Opp. at 24.[2] There is no

26 comparison. As the *Stevens Linen* court noted, “we can reasonably believe that these customers

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28   [2] Additionally, this distinction does nothing to salvage Dr. Lynde’s IBM opinion, which counts all
    purchasers as lost Elastic customers.

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1   of Stevens had a demand for this type of fabric and were shifting their purchasing to the cheaper

2   infringing fabrics and away from Chestertown." *Stevens Linen Assocs., Inc. v. Mastercraft Corp.*,

3   656 F.2d 11, 15 (2d Cir. 1981). This methodology would be equivalent to Dr. Lynde only

4   counting as lost profits those customers who had first purchased a license from Elastic and then

5   shifted over to AESS or IBM Databases, a methodology that might well have offered a reliable

6   way to measure damages here (even if just based on an estimate of such customers). But that is a

7   methodology that Dr. Lynde did not employ.

8   Finally, while the "default judgment" decisions do not arise in the context of *Daubert,*

9   they nonetheless offer useful guidance on the kinds of damages theories that courts will accept.

10   In *Crunchyroll*, the "chain of causation" was not only broken by pricing. *See* Opp. at 24-25.

11   The Court also observed that "YouTube.com and Crunchyroll.com are different websites which

12   attract a different client base," and in addition to being free, another reason that many of the

13   YouTube viewers may have watched the shows at issue was "because they were on YouTube."

14   *Crunchyroll, Inc. v. Pledge*, No. C 11-2334 SBA, 2014 WL 1347492, at *20 (N.D. Cal. Mar. 31,

15   2014). Likewise, one of the many reasons that a customer may have bought a product from

16   AESS or IBM was because the product was offered by AESS or IBM (two of the largest and

17   most famous companies in the world)—an extremely reasonable possibility that Dr. Lynde

18   ignores. With respect to the *Adobe* case, while the court recognized that some of the infringing

19   goods were sold at a discount, the case still stands for the proposition that a plaintiff may not

20   simply assume it would have made all infringing sales. *See Adobe Sys. Inc. v. Software Tech*,

21   No. 5:14-cv-02140-RMW, 2016 WL 4728119, at *6 (N.D. Cal. Sept. 8, 2016). Similarly, the

22   *Reiffer* court recognized that a plaintiff cannot be awarded lost profits based on unsold prints of a

23   copyrighted photograph without "evidence that but for defendant's infringement he would have

24   sold all of the prints." *Reiffer v. Shearwater Pac. Cap. Mgmt. LLC*, No. 18-cv-06053-JSW

25   (RMI), 2020 WL 7048307, at *7 (N.D. Cal. May 13, 2020), *report and recommendation*

26   *adopted*, No. 18-cv-06053-JSW, 2020 WL 7050026 (N.D. Cal. June 22, 2020). Dr. Lynde's

27   opinion is also devoid of such evidence.

28   / / /

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In sum, ample authority supports floragunn's motion to exclude Dr. Lynde's 1:1 lost profits analysis.

CONCLUSION

floragunn respectfully requests that the Court exclude the testimony of Elastic's expert, Dr. Matthew Lynde, regarding Elastic's alleged lost profits attributable to Amazon's and IBM's sales.

DATED: September 21, 2021   **KWUN BHANSALI LAZARUS LLP**

By: /s/ *V. David Rivkin*   _____

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<u>CERTIFICATE OF SERVICE</u>

I am an attorney with Wuersch & Gering LLP, counsel for Defendant in the above-referenced proceeding. I hereby certify that on September 21, 2021 I caused the foregoing Defendant's Reply in Support of Motion to Exclude Portions of Testimony of Plaintiffs' Expert Matthew Lynde to be served electronically via CM/ECF upon Plaintiffs Elasticsearch, Inc. and elasticsearch B.V.

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/s/ Michael Senzer

Michael Senzer

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